83-2141

No.

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In the Supreme Court of the United States

October Term, 1983

DELFINO SANCHEZ-MARQUEZ,

Petitioner,

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I. Whether the government met its burden of proving by clear, convincing and unequivocal evidence that petitioner violated Title 8 U.S.C. Section 1251(a)(13) and therefore should be deported.

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In the Supreme Court of the United States

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DELFINO SANCHEZ-MARQUEZ,

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v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the Board of Immigration Appeals decision not to reopen the deportation hearing of the petitioner, resulting in his deportation is not yet reported. It is attached hereto at Appendix ("App. 1").

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit affirming the decision of the Board of Immigration Appeals resulting in the deportation of the petitioner was entered January 10, 1984.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

8 U.S.C. § 1251 provides in pertinent part:

> § 1251. Deportable aliens—General classes
>
> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * *
>
> (13) prior to, or at the time of any entry, or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.
>
> * * *
>
> § 242.14 Evidence.
>
> (a) Sufficiency. A determination of deportability shall not be valid unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true.

STATEMENT OF THE CASE

Nature Of The Case

On December 2, 1976, petitioner, Delfino Sanchez-Marquez pleaded guilty to charges of aiding and assisting for gain an alien to enter the United States at a place other than as designated by Immigration officials. Mr. Sanchez was subsequently found to be deportable pursuant to charges under Title 18 U.S.C. § 1251(a)(13). The conviction of Mr. Sanchez was expunged on July 31, 1978. Mr. Sanchez has exercised all the administrative remedies by filing the appropriate motions to reopen and for reconsideration before the Immigration Service and the Board of Immigration Appeals. Each of these motions have been denied by the Immigration Service and the Board of Immigration Appeals.

On September 10, 1982, petitioner caused to be filed a petition for judicial review of an order of deportation before the United States Court of Appeals for the Seventh Circuit. On January 10, 1984, the Seventh Circuit affirmed the decision of the Board of Immigration Appeals. Mr. Sanchez now comes before the Supreme Court of the United States and petitions said Court to review that decision.

STATEMENT OF FACTS

The petitioner-appellant, Delfino Sanchez-Marquez, is a native and citizen of Mexico, who was admitted as an immigrant to the United States on August 5, 1974. (R. p. 3).*

Mr. Sanchez-Marquez is married and the father of one child, who is a United States citizen. Mr. Sanchez-Marquez resides in Chicago, with his family (R. p. 21).

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* All references to the record are to the numbers in the lower right-hand corner of the record pages and are indicated by "R. p. ----."

The Criminal Conviction

On December 2, 1976, in the District Court for the Western District of Texas-Del Rio, Mr. Sanchez-Marquez entered a guilty plea to the charge of aiding and assisting for gain an alien to enter the United States from the Republic of Mexico at a place other than as designated by immigration officials of the United States for the entrance of immigrants into the United States, in violation of 8 U.S.C. §1325. Subsequently, Sanchez-Marquez was sentenced to five years unsupervised probation and a five hundred dollar fine. (R. p. 37).

On July 31, 1978, the petitioner was resentenced pursuant to the Youth Corrections Act, 18 U.S.C. §5010(a). (R. p. 39). In keeping with the spirit and intent of the Youth Corrections Act the conviction of December 2, 1976, of Mr. Sanchez-Marquez was set aside pursuant to the provision of 18 U.S.C. §5021(b). This also occurred on July 31, 1978. (R. p. 40).

The Deportation Proceedings

On June 6, 1977, the Immigration and Naturalization Service commenced deportation proceedings against the petitioner by filing an Order to Show Cause and Notice of Hearing. (R. p. 199). On September 12, 1977, a hearing was held at Chicago before Immigration Judge E. A. Berman. (R. p. 184). Petitioner was represented by counsel at this hearing. (R. p. 185). The Service introduced and moved for admission the Judgment and Probation Commitment Order of the United States District Court for the Western District of Texas-Del Rio relating to Mr. Sanchez-Marquez' conviction. The only testimony heard that day was that of Mr. Sanchez-Marquez. The questioning centered around the circumstances which led to his arrest and conviction on December 2, 1976.

Mr. Sanchez-Marquez testified that he had gone to Mexico for vacation (R. p. 190) and while visiting Piedras Negas Coahuila, Mexico, he met the aliens who later were arrested with the petitioner on the United States side of the border (R. p. 191).

Mr. Sanchez-Marquez testified that at no time did he participate or aid anyone in actually crossing the border. (R. p. 191). Mr. Sanchez-Marquez did admit that the aliens had told him that they would be willing to pay him, if once they had crossed the border and arrived in the United States he would meet them and drive them to Chicago. (R. p. 192). The petitioner further testified that he did later meet the alien Mexicans on the United States side of the border and permitted them to enter his truck. After driving for about ten minutes they were stopped by the border patrol and arrested (R. pp. 192, 193). Mr. Sanchez-Marquez testified that he never received any money from any of the aliens for assisting them once across the border. (R. pp. 191, 192). The Service introduced no evidence to rebut the testimony of Mr. Sanchez-Marquez.

Subsequently, on November 9, 1977, the Immigration Judge found the petitioner deportable as charged and ordered that he be deported to Mexico. (R. p. 28). The petitioner took no appeal. On January 9, 1978, the petitioner moved to reopen and reconsider and requested a stay of deportation. In a decision dated January 10, 1978, the Immigration Judge granted the request for a stay of deportation pending consideration of the petitioner's motion. (R. p. 81). The petitioner's motion to reopen and reconsider was denied. The petitioner appealed that decision and on May 30, 1978, the Board of Immigration Appeals dismissed the appeal. (R. p. 82).

Sometime between May 30, 1978, and April 21, 1982, the petitioner filed another motion to reopen and re-

consider his deportation based upon new evidence, the evidence being the expunction of his December, 1976, conviction. This expunction took place on July 31, 1978. (R. p. 28).

There is no explanation in the record for the delay which, as noted by the Board of Immigration Appeals, was a two-year period. (R. p. 28). The Board, however, found no merit in the petitioner's argument and denied his motion. This decision was entered April 21, 1982. (R. p. 28).

On June 21, 1982, the petitioner filed an Application For Advance Permission To Return To Unrelinquished Domicile. This is commonly known as a 212(c) petition. (R. p. 21).

On August 11, 1982, the petitioner filed another motion to reopen and reconsider deportation. (R. p. 19). On August 13, 1982, the petitioner applied telephonically for a stay of deportation pending consideration by the Board of Immigration Appeals of the new motion to reopen and reconsider. The request was denied. (R. p. 15).

On or about September 13, 1982, the petitioner was taken into custody and preparations were made by the Service for his immediate deportation. On that day counsel for petitioner filed a Petition for Writ of Habeas Corpus in the District Court. (R. p. 25). The petitioner was brought before the Court wherein it was determined that the Petition for Writ of Habeas Corpus would be dismissed. (R. p. 26). The petitioner immediately took this petition for judicial review thereby staying his deportation pending this appeal. (R. p. 9).

REASONS FOR GRANTING THE WRIT

I.

VIEWED IN A LIGHT MOST FAVORABLE TO THE GOVERNMENT NO RATIONAL TRIER OF FACT COULD HAVE FOUND THAT THE GOVERNMENT MET ITS BURDEN OF PROVING BY CLEAR, CONVINCING AND UNEQUIVOCAL EVIDENCE THAT THE PETITIONER VIOLATED TITLE 8 U.S.C. SECTION 1251 (A)(13) AND THEREFORE SHOULD BE DEPORTED.

On November 11, 1977, the petitioner, Delfino Sanchez-Marquez was found to be deportable as charged under Section 241(a)(13), 8 U.S.C. 1251(a)(13). Section 241(a)-(13) provides that a person may be deported if prior to, or at the time of entry, or at anytime within five years after any entry, that person shall knowingly and for gain, aid, assist, encourage, induce or abet any other alien to try to enter the United States in violation of law. Conviction for assisting illegal entrants is not explicitly required.

The Government has the burden of proving deportability of the person charged by clear, convincing and unequivocal evidence. *Woodby* v. *Immigration Service*, 385 U.S. 276, 875 S.Ct. 483, 17 L.Ed.2d 362 (1966); *Ribeiro* v. *Immigration & Naturalization Serv.*, 531 F.2d 179 (3rd Cir. 1976); 8 U.S.C. §242.17(a). Therefore, in order to merit a finding that Mr. Sanchez was deportable, the Government had the burden of proving by clear, convincing and unequivocal evidence that Mr. Sanchez knowingly and for gain assisted or aided the alleged aliens to enter the United States illegally. The question presented in this petition for review is whether the Government did in fact meet this burden.

The Immigration Judge, the Government and the Board of Immigration Appeals have all placed a great deal of reliance on the December 2, 1976, conviction. On December

2, 1976, Mr. Sanchez after entering a plea of guilty was convicted of violating 8 U.S.C. Section 1325 for aiding aliens to enter the United States illegally. (R. p. 214).

On November 9, 1977, the Immigration Judge in finding Mr. Sanchez deportable, stated: ". . . in view of his conviction on December 2, 1976, he is mandatorily deportable and there is no discretionary relief." (R. p. 178). Subsequently, on July 31, 1978, this conviction was expunged and Mr. Sanchez was resentenced under the Federal Youth Corrections Act. (R. pp. 39, 40). Because of the expunction, Mr. Sanchez is no longer "mandatorily deportable." This expunction was raised to the Board of Immigration Appeals as new evidence supportive of a motion to reopen and for reconsideration of the deportation proceedings. While it is clear that expunction of a conviction under the Federal Youth Corrections Act removes the conviction as a basis of deportability, *Matter of Becker*, Int.Dec. 2511 (August 2, 1976), *Matter of Zingis*, 14 I&N Dec. 621 (1974), *Mestre-Morera* v. *United States Immigration & Nat. Serv.*, 462 F.2d 1030 (1st Cir. 1972), Mr. Sanchez does recognize that a conviction is not a material and necessary element toward a finding of deportability pursuant to 8 U.S.C. §1251(a)(13).

However, because the conviction has been expunged it is crucial that other evidence be reviewed to determine if the Government met its burden of proof. The petitioner contends that the Government failed to meet this burden by failing to show by clear, convincing and unequivocal evidence that Mr. Sanchez knowingly aided aliens to enter the United States illegally or that he acted "for gain." The testimony presented at the September 12, 1977, deportation hearing was as follows:

1. That Mr. Sanchez was in Mexico on vacation, not to arrange with aliens to come to the United States. (R. p. 190).

2. By coincidence, Mr. Sanchez met several Mexicans during his vacation. They asked if he was re-

turning to Chicago and if so would he give them a ride. Mr. Sanchez responded by saying he would give them a ride *if* they were on the United States side of the border when he was. If not, he wouldn't and he wouldn't wait for them. (R. pp. 190-191).

3. The Petitioner further testified that he and the aliens did not discuss a price. The aliens said they would pay him what they could, that they would give him $150 if they could. (R. p. 192).

4. Finally, Mr. Sanchez testified that he did not know how the aliens crossed the border and he did not know if they had proper papers to be in the United States. (R. pp. 192-193).

This testimony stands unrebutted by the Government. The Government presented no evidence to prove that Mr. Sanchez knowingly assisted these aliens to cross the border. He did not cross with them nor did he have any knowledge of the time, place or manner of entry of the aliens he purportedly assisted, nor was he aware that the aliens did not have proper papers to enter the United States. Thus, Mr. Sanchez could not have been found to have aided or assisted the aliens knowingly without a clear showing that he had knowledge of the entry plans and lack of papers of the aliens. Therefore, the Court's finding of deportability is contrary to the evidence as the Government has failed to prove by clear, convincing or unequivocal evidence that Mr. Sanchez knowingly aided the aliens to enter the United States illegally.

Further, the Government has failed to prove that Mr. Sanchez acted "for gain." The Government has shown only that the aliens said they would pay him whatever they could; they would give him $150 if they could. During the deportation hearing, Mr. Sanchez testified as follows with regard to payment arrangements:

Q. Did you agree on a price that you would charge them for taking them?

A. There was no set price sir, we did not talk about a price. They would pay me what they could.

Q. Why did you testify earlier that they agreed to pay you $150 apiece?

A. That amount the $150 was what they were going to pay me if they wanted to, if they could.

Q. So you did agree on a sum of $150?

A. They said they would give me the $150, but they weren't sure. (R. p. 192).

Given the circumstances surrounding these events and the representations made to Mr. Sanchez, it is unclear that Mr. Sanchez has a reasonable basis on which to anticipate gain. He was told he would be given some money if they were able. This, therefore, raises the possibility that he would receive nothing at all. Further, there is no evidence that the sum possibly to be received would be in excess of the expenses incurred in transporting seven aliens from Texas to Illinois. See *Ribeiro* v. *Immigration & Naturalization Serv.*, 531 F.2d 179 (3rd Cir. 1976).

Let us now examine the additional facts which support the argument that the Government failed to meet its burden of proof.

Mr. Sanchez in an affidavit under oath stated that:

1. After his arrest in Texas, he retained local counsel who advised him to plead guilty to having aided the entry of the alien for payment of $150 as that was the only way he would be freed quickly. His attorney explained that if he did not plead guilty he would spend several months in jail awaiting trial.

2. He pleaded guilty only because his attorney strongly recommended it and because his attorney assured him that there would be no further or future problems with the immigration authorities.

3. His plea of guilty was not made knowingly or voluntarily. (R. pp. 68-72).

Additionally, Mr. Sanchez met only four of the seven aliens while in Mexico. Three of those four were cousins of Mr. Sanchez. The Board of Immigration Appeals in the *Matter of G.M.*, 5 I.&N. Dec. 93 (1953), held that assisting a relative alien enter the United States is not a deportable offense under Section 241(a)(13).

The Immigration Judge, in denying respondent's (Mr. Sanchez') motion to reopen the deportation hearing, stated "It is concluded that the offense of knowingly aiding and abetting an alien to enter the United States in violation of law has been conclusively established by the respondent's conviction on December 2, 1976. (R. p. 118). However, it must be restated that the conviction has been expunged and therefore the judge's reliance thereon is improper. The question of whether Mr. Sanchez knowingly aided or abetted must turn on the evidence presented at the deposition hearing. Without the conviction of Mr. Sanchez, the Government has failed to prove by clear, convincing and unequivocal evidence that Mr. Sanchez knowingly and for gain violated Section 241(a)(13).

CONCLUSION

WHEREFORE, for the above reasons, petitioner respectfully requests this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 82-2424

DELFINO SANCHEZ-MARQUEZ

Petitioner,

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Appeal from a Decision of
the Board of Immigration Appeals

SUBMITTED DECEMBER 9, 1983*—DECIDED JANUARY 10, 1984

Before WOOD, ESCHBACH, and COFFEY, *Circuit Judges.*

PER CURIAM. Petitioner seeks review of a decision of the Board of Immigration Appeals ("BIA" or "Board") denying petitioner's motion to reopen his deportation pro-

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need or Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

ceedings and to set aside his deportation order. We affirm the Board's decision.

I.

Petitioner was admitted to the United States as a permanent resident alien on August 5, 1974. On December 2, 1976, petitioner pleaded guilty to a charge of aiding and assisting an alien to enter the United States at a place other than as designated by immigration officers, in violation of 8 U.S.C. § 1325 (1976), as provided in 18 U.S.C. § 2 (1976).[1]

The Immigration and Naturalization Service ("INS") began deportation proceedings against petitioner on June 6, 1977, charging that petitioner had, within five years of entering the United States, knowingly and for gain encouraged, induced, assisted, abetted or aided another alien ot enter the United States in violation of the law.[2] At a hearing on September 12, 1977, before an Immigration Judge, the INS introduced a copy of the judgment of peti-

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[1] It is a crime for aliens to enter the United States "at any time or place other than as designated by immigation officers." 8 U.S.C. § 1325 (1976). An individual who "aids, abets, counsels, commands, induces or procures" the commission of an offense against the United States is punishable as a principal. 8 U.S.C. § 2 (1976).

[2] 8 U.S.C. § 1251(a) (1976) provides in part:

> (a) Any alien in the United States (including any alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> . . .
>
> (13) prior to, or at the time of any entry, or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law;
>
> . . .

tioner's 1976 conviction and also took testimony from petitioner as to the circumstances which led to his arrest and conviction. Petitioner was represented by counsel at this hearing. The Immigration Judge found petitioner deportable in a decision dated November 9, 1977. Petitioner did not appeal this decision.

On July 31, 1978, a federal magistrate set aside petitioner's 1976 conviction and expunged the conviction from the record, pursuant to the Federal Youth Correction Act, 18 U.S.C. § 5021(b) (1976). Petitioner then moved the BIA to reopen his deportation proceedings and set aside his deportation order. The BIA denied petitioner's motion on April 21, 1982 and petitioner filed a timely petition with this court to review the April 21 order under 8 U.S.C. § 1105a (1976), *as amended by* Act of Dec. 29, 1981, Pub. L. No. 97-116, § 18(b), 95 Stat. 1620 (1981).

II.

The BIA's denial of a motion to reopen deportation proceedings is a final order of deportation and is subject to limited review in this court; we will overturn the BIA's decision only if the Board abused its discretion in denying the motion. *Diaz-Salazar* v. *Immigration and Naturalization Service*, 700 F.2d 1156, 1159 (7th Cir.), *cert. denied*, 103 S. Ct. 3112 (1983). We cannot substitute our judgment for the Board's. *Kashani* v. *Immigration and Naturalization Service*, 547 F.2d 376, 378 (7th Cir. 1977).

Petitioner claims that the expunction of his conviction removed the evidentiary support for the 1977 INS finding

that petitioner was deportable.[3] The BIA disagreed and so do we.[4]

Motions to reopen deportation proceedings are not granted by the BIA "unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 3.2 (1982). The BIA agreed that the expunction of petitioner's conviction was new evidence, but stated that it was not "material" because the finding of deportability was supported by evidence in the record independent of the conviction.

Petitioner makes three arguments in support of his contention that the Board erred in denying his motion. The first is that there is no evidence that he "knowingly" assisted seven aliens in crossing the border illegally. Petitioner testified, at the September 12, 1977 hearing, that he had gone to Mexico on vacation and met the seven aliens there by coincidence. He further testified that he told the aliens that he would drive them from the Texas border to San Antonio and then to Chicago if they met petitioner on the American side of the border. Although petitioner stated that he did not know whether the seven aliens crossed at a legal inspection point or had proper papers to enter this country, there was sufficient circumstantial evidence to establish that petitioner acted know-

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[3] Petitioner admits, however, that a conviction is not a material and necessary element to a finding of deportability pursuant to 8 U.S.C. § 1251(a)(13).

[4] The INS does not argue that a conviction expunged pursuant to the provisions of the Federal Youth Corrections Act can be used as the basis for deportation. *See Mestre Morera* v. *United States Immigration and Naturalization Service*, 462 F.2d 1030 (1st Cir. 1972). *Compare United States* v. *Madison*, 689 F.2d 1300, 1314-15 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 754 (1983) (a dismissed juvenile charge may be considered in sentencing following a subsequent criminal conviction).

ingly. If the aliens had the proper documentation to enter the United States legally, there was no need to meet them on the American side of the border; the aliens could have crossed the border with petitioner. The BIA could reasonably infer that petitioner knew that the seven aliens entered this country illegally. Moreover, petitioner's statement to the aliens that he would transport them if they met him on the American side of the border could certainly be construed as having "encouraged" or "induced" the aliens to cross the border illegally. We cannot say that the BIA abused its discretion in refusing to reopen the deportation proceedings because of the alleged lack of evidence on petitioner's state of mind.

Petitioner's second argument is that there is insufficient evidence that he acted "for gain." Because acting for gain is not one of the elements of the criminal offense of which petitioner was convicted, his conviction could not be used to establish this element of deportability under § 1251 (a)(13). Although the setting aside of petitioner's conviction, which is the basis of his motion to reopen, is therefore irrelevant to the immigration judge's 1977 finding that he acted for gain, we have considered petitioner's arguments concerning the "for gain" element and find them to be without merit.

Petitioner testified early in the hearing that he charged the aliens $150 apiece to take them to San Antonio. Later in the hearing, petitioner testified as follows:

> Q: Did you agree on a price that you would charge them for taking them?
>
> A: There was no set price sir, we did not talk about a price. They would pay me what they could.
>
> Q: Why did you testify earlier that they agreed to pay you $150 apiece?

A: That amount the $150 was what they were going to pay me if they wanted to, if they could.

Q: So you did agree on a sum of $150?

A: They said they would give me the $150, but they weren't sure.

There is no evidence in the record that petitioner received any money from the seven aliens.

Actual receipt of money by petitioner is not necessary to establish that he acted "for gain." An agreement to pay later constitutes gain, or anticipated gain, and is sufficient to bring petitioner within the ambit of § 1251(a)(13). *Matter of P.G.*, 7 I & N Dec. 514, 516 (1957). *See also Navarrette-Navarrette* v. *Landon*, 223 F.2d 234 (9th Cir. 1955), *cert. denied*, 351 U.S. 911 (1956); *Matter of B. G.*, 8 I & N Dec. 182 (1958).

Petitioner asserts that the uncertainty regarding payment makes it unclear that he had a reasonable basis on which to anticipate gain. Although petitioner's testimony as to gain is ambiguous in that it was not certain that he would be paid $150 by each of the seven aliens, one can reasonably infer that there was an agreement to pay petitioner something at a later date. This is sufficient to establish that petitioner acted "for gain." *See Matter of P.G.*, 7 I & N Dec. at 517 (anticipation of compensation to be paid when the assisted aliens were able to pay establishes anticipated gain sufficient to bring respondent within the deportation provision); *Navarrette-Navarrette*, 223 F.2d at 236 (aliens told respondent they would give him fifty dollars when they got work). It is evident that petitioner's assistance to the seven aliens "was not done for either love, charity or kindness, but for tangible substantial financial advantage." *Gallegos* v. *Hoy*, 262 F.2d 665, 666 (9th Cir. 1958).

Petitioner further argues that there is no evidence that the sum to be received would be in excess of the expenses incurred in transporting the seven aliens to Chicago, citing *Ribeiro* v. *Immigration and Naturalization Service,* 531 F.2d 179 (3rd Cir. 1976). The *Ribeiro* court held that the statutory phrase "for gain" required "the prospect of an excess of tangible return over expenditure in a particular transaction." 531 F.2d at 180. However, the court also stated that a showing that petitioner was to receive a modest sum of money "may well be sufficient to support a finding that the alien acted 'for gain' where the record contains no evidence of offsetting expenses or losses contemplated." *Id.* In the instant case, petitioner did not introduce any evidence of offsetting expenses, unlike the *Ribeiro* petitioner. The possibility of receiving $150 apiece from seven people cannot, under these circumstances, be characterized as expenses only or a minimum payment. *See Matter of Contreras,* Interim Decision No. 2859 (BIA March 20, 1981). In addition, it appears from the record that petitioner would have returned to Chicago from his vacation regardless of whether he agreed to transport the seven aliens; if this is the case, "to the extent that the contemporaneous payments covered expenses of a trip which [petitioner] would have made anyway, an 'expectation' of gain could reasonably be found." *Ribeiro,* 531 F.2d at 181. In other words, petitioner here did not make a special trip to accommodate the seven aliens. *Compare Ribeiro.*

Petitioner's final argument is that three of the aliens were petitioner's cousins and that assisting a relative alien to enter the United States is not a deportable offense under § 1251(a)(13). *See Matter of G. M.,* 5 I & N Dec. 93 (1953). However, *Matter of G. M.* is inapposite here, as petitioner does not claim that all seven aliens were relatives of his.

For the reasons stated, we hold that the BIA did not abuse its discretion in denying petitioner's motion to reopen his deportation proceedings.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT

Western District Of Texas

Del Rio Divison At Eagle Pass

United States of America vs. Delfino Sanchez-Marquez

Magistrate's Docket No. VI

Docket No.—Case No. IM-76-337M

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of * * * for the government, J. S. Rembla, SP. Agt. the defendant appeared in person on this date—December 2nd

* * * * *

COUNSEL—Rey Perez, Esq.

PLEA—GUILTY, and the court being satisfied that there is a factual basis for the plea.

FINDING & JUDGMENT — There being a finding of GUILTY. Defendant has been convicted as charged of the offense(s) of on or about November 18th, 1976, near Eagle Pass, Texas, Del Rio Division, in the Western District of Texas, Delfino Marquez, did aid and assist for gain Porfirio Arrez-Chaves, an alien, to the United States from the Republic of Mexico at a point near Eagle Pass, at a place other than as designated by Immigration Officials of the United States for the entrance of immigrants into the United States, in violation of U.S.C. Title 8 Section 1325 As Provided In 18 USC 2.

* * * * *

SENTENCE OR PROBATION ORDER—5 months and is assessed a fine in the amount of $500.00, to be paid instanter and upon payment of such fine the five-months sentence is suspended and the defendant is placed on probation for a period of 5 years, without supervision. Payment of such fine is a term and condition of probation; and the release of the defendant under such probation order is conditioned upon the payment of said fine.

SPECIAL CONDITIONS OF PROBATION—Defendant Is Placed On Probation Without Supervision Under The Terms Of Probation Order Filed December 26th, 1973.

* * * * *

Signed By—Illegible
U.S. Magistrate

Date—12-2-76

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

File: A35 054 050—Chicago November 9, 1977

In the Matter of

DELFINO SANCHEZ-MARQUEZ	)	IN DEPORTATION PROCEEDINGS
Respondent	)	

CHARGE:

I & N Act—Section 241(a)(13) (8 USC 1251(a)(13))—Within five years after entry knowingly and for gain aided and assisted alien to enter the United States in violation of law

APPLICATION: Termination of proceedings

IN BEHALF OF RESPONDENT:

James E. Laski, Attorney
Miller & Pomper
19 South LaSalle Street
Chicago, Illinois

IN BEHALF OF THE SERVICE:

Oliver H. Claypool
Trial Attorney
Chicago, Illinois

DECISION OF IMMIGRATION JUDGE

The respondent is a 22-year-old married male. As alleged in the Order to Show Cause, the respondent, through his attorney, admitted that he is an alien, a native and citizen of Mexico, who entered the United States at Eagle Pass, Texas on August 5, 1974 at which time he was ad-

mitted as an immigrant, and that on December 2, 1976 he was convicted in the United States District Court for the Western District of Texas—Del Rio Division for the violation of Title 8 USC, Section 1325, as provided in Title 18 USC, Section 2, in that on November 18, 1976 he did aid and assist for gain an alien to enter the United States at a place other than is designated by United States Immigration officials for entrance into the United States. Through his attorney the respondent denied deportability on the charge contained in the Order to Show Cause.

Pursuant to stipulation between counsel and the Trial Attorney Group Exhibit 2 and Exhibit 3 were received in evidence. Group Exhibit 2 is the immigrant visa of the respondent, which is endorsed to show his admission to the United States at Eagle Pass, Texas on August 5, 1974 for permanent residence.

Exhibit 3 is a certified copy of a Judgement and Probation/Commitment Order in the United States District Court for the Western District of Texas—Del Rio Division at Eagle Pass, Texas in the Case of United States of America v. Delfino Sanchez-Marquez, Case No. IM. 76-337M, which shows that the defendant upon his plea of guilty was convicted on December 2, 1976, for the offense of aiding and assisting for gain an alien to enter the United States at a place other than as designated by Immigration officials of the United States for entrance of immigrants into the United States in violation of USC Title 8, Section 1325 as provided in Title 18, Section 2. The court in that judgement ordered that the respondent be sentenced to incarceration for a period of five months and to a fine of five hundred dollars to be paid instanter, and upon payment of such fine the five-month sentence was to be suspended, and the defendant placed on probation for a period of five years without supervision.

A copy of the complaint upon which the conviction in Exhibit 3 is based was entered in the record without objection as Exhibit 4. The complaint is for the violation of Title 8 USC, Section 1325, as provided in Title 18 USC, Section 2. The complaint alleges that on November 18, 1976 Delfino Sanchez-Marquez did aid and assist for gain an alien to enter the United States at a point near Eagle Pass, Texas other than as designated officials of the United States for entrance of immigrants into this country.

The respondent testified that he was convicted for arranging with aliens in Mexico to bring them from the Texas border to Chicago; that there were seven aliens involved, and that each of them was to pay him a hundred and fifty dollars. He stated that at the time of his arrest he had not been paid anything.

The respondent testified that he did not go to Mexico for the purpose of aiding or assisting aliens to come to the United States. He said that his purpose in going to Mexico was for a vacation. He was asked how he happened to make arrangements to help these aliens come to this country, and he said he met them by coincidence, and that they asked if he was going to the United States and if he would bring them. He testified he did not arrange to meet them on the Texas side, but that they told him that they planned to cross into the United States, and he said if he was there when they crossed he would take them, otherwise he would leave.

The respondent testified that he did not cross with the aliens, and that they crossed by themselves. He also stated that he did not have any arrangements with them that they would pay him a definite sum for his services. Upon being reminded that he had testified earlier that they were to pay him $150 each he stated that there was no definite sum agreed upon, but that they said they would pay him $150 or whatever they could.

The respondent testified that the aliens got into his truck on the United States side, and he was driving with them for about ten minues when they were stopped by immigration officers. The respondent claimed that he did not know how the aliens entered the United States and whether or not they had "papers."

The evidence in this case establishes that the respondent was convicted on December 2, 1976 for the offense committed on November 18, 1976 of aiding and assisting aliens to enter at a place other than designated by immigration authorities in violation of Title 8, USC, Section 1325, as provided in Title 18 USC, Section 2.

Counsel contends that there is no evidence that the respondent received any gain as specified in the statute. He submitted a memorandum of law in which he argued that the charge in the Order to Show Cause is based on Section 241(a)(13) of the Immigration and Nationality Act, which provides that an alien is subject to deportation if he aids and abets and alien knowingly and for gain to enter the United States in violation of law. Counsel contends that in *Matter of J*, 6 I&N Dec. 823 an alien was found deportable on the charge here involved, but that the Board of Immigration Appeals in that case found that that alien actually did receive remuneration for his unlawful activities by way of direct payments, while in the present proceedings the "for gain" element has not been established.

In reply the Trial Attorney called attention to the decision in the *Matter of P.G.* 7 I&N Dec, 514. In that case the Board of Immigration Appeals considered a similar argument and held that the anticipation of profit, no matter how small, brings an alien within the deportation provision of Section 241(a)(13) of the Act.

In the present case, although the respondent after first testifying that the aliens were to pay him a hundred and fifty dollars each later stated that there was no definite sum agreed upon, but that they were to pay whatever they could. It is clear that the respondent anticipated some compensation from the aliens. This anticipated compensation is sufficient to bring the respondent within the deportation provision of Section 241(a)(13) of the Act. Inasmuch as the offense for which the respondent was convicted on December 2, 1976 was committed within five years after his entry into the United States on August 5, 1974, it is concluded that the respondent's deportability on the charge contained in the Order to Show Cause has been established by evidence which is clear, convincing and unequivocal.

The respondent is married to an alien who he stated is in the process "of applying for papers." They have one child who was born in Melrose Park, Illinois on October 22, 1975. The respondent's parents and his six brothers and eight sisters are all lawful permanent residents of the United States. The respondent testified that he has never been arrested for any other offense or on any other occasion. However, in view of his conviction on December 2, 1976 he is mandatorily deportable and there is no discretionary relief available to him. The respondent named Mexico as the country to which his deportation should be directed in the event his deportation becomes necessary.

ORDER: IT IS ORDERED that the respondent be deported from the United States to Mexico on the charge contained in the Order to Show Cause.

/s/ *E. A. Berman*
E. A. Berman
Immigration Judge

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE

Board of Immigration Appeals

Washington, D.C. 20530

Files: A35 054 050 — Chicago APR 21 1982

In re: DELFINO SANCHEZ-MARQUEZ

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:

Terry Y. Feiertag, Esquire
39 South LaSalle Street
Suite 705
Chicago, Illinois 60603

ON BEHALF OF SERVICE:

Craig M. Zerbe
General Attorney

CHARGE:

Order: Sec. 241(a)(13), I&N Act [8 U.S.C. 1251(a)(13)]—Within five years after entry, knowingly and for gain aided and assisted aliens to enter the United States in violation of law

APPLICATION: Motion to reopen; termination

In a decision dated November 9, 1977, the immigration judge found the resondent deportable as charged and ordered that he be deported to Mexico. The respondent took no appeal. On January 9, 1978, the respondent moved to reopen and reconsider and requested a stay of deportation. On January 10, 1978, the immigration judge granted the

request for a stay of deportation pending consideration of the respondent's motion. In a decision dated February 9, 1978, the immigration judge denied the motion to reopen and reconsider. We dismissed the respondent's appeal from that decision on May 30, 1978. The respondent now moves to reopen these proceedings based upon the fact that on July 31, 1978, his conviction under 18 U.S.C. 2 for aiding and abetting the violation of section 275 of the Immigration and Nationality Act, 8 U.S.C. 1325, was set aside on July 31, 1978, pursuant to the Federal Youth Corrections Act, 18 U.S.C. 5021(b).[1] The motion will be denied.

The sole basis for this motion is the aforementioned expunction. However, the respondent's deportability is not premised upon that conviction but, rather, upon his knowing and for gain assistance of aliens to unlawfully enter the United States under section 241(a)(13) of the Act, 8 U.S.C. 1251(a)(13). As stated in both decisions of the immigration judge, such deportability was shown not only by the respondent's conviction but *independently by his testimony at the deportation hearing and other evidence of record as well.*

Federal regulations at 8 C.F.R. 3.2 provide, in part, that, "Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at

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[1] Counsel's delay in not filing the instant motion until some one and one half years after that expunction occurred is wholly unexplained. Even more disturbing is the intolerable delay of the Service in failing to forward the motion and record of proceedings to the Board until March 13, 1982, over two years after the motion was filed.

the former hearing." 8 C.F.R. 3.8(a) provides further that, "Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material." Both provisions were strictly construed by the United States Supreme Court in *INS* v. *Wang,* 450 U.S. ....., 101 S. Ct. 1027 (1981).

The respondent's expunction is indeed a new fact which was previously unavailable. Nevertheless, inasmuch as the respondent's conviction was neither a necessary nor sufficient fact upon which he was found to be deportable, expunction of that conviction is not material to his deportability. Therefore, the expunction does not mandate reopening of these proceedings. *See* 8 C.F.R. 3.2. The respondent's motion also made mention of several other grounds for challenging his deportation which he previously raised before the immigration judge and on appeal. However, the immigration judge found these arguments to be without merit and we implicitly rejected them when we dismissed the earlier appeal. Moreover, they are defective under the motion requirements of 8 C.F.R. 3.2 and 3.8(a). Accordingly, the instant motion presents nothing to warrant reopening these proceedings.

ORDER: The motion to reopen is denied.

/s/ *David L. Michollan*
Chairman